IN THE APPELLATE DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2022] SGHC(A) 43

Civil Appeal No 3 of 2022

Between

Loy Wei Ezekiel

… *Appellant*

And

Yip Holdings Pte Ltd

… *Respondent*

Summons No 26 of 2022

Between

Loy Wei Ezekiel

… *Applicant*

And

Yip Holdings Pte Ltd

… *Respondent*

Version No 1: 06 Dec 2022 (11:43 hrs)

In the matter of Suit No 836 of 2020

Between

Yip Holdings Pte Ltd

… *Plaintiff*

And

Loy Wei Ezekiel

… *Defendant*

GROUNDS OF DECISION

[Civil Procedure — Appeals — Admission of further evidence on appeal]

[Civil Procedure — Judgments and orders — Setting aside regular default judgments]

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Loy Wei Ezekiel
v
Yip Holdings Pte Ltd and another matter

[2022] SGHC(A) 43

Appellate Division of the High Court — Civil Appeal No 3 of 2022 and Summons No 26 of 2022
Belinda Ang Saw Ean JCA, Woo Bih Li JAD and Hoo Sheau Peng J
20 July 2022, 11 August 2022

6 December 2022

Hoo Sheau Peng J (delivering the grounds of decision of the court):

Introduction

1 AD/CA 3/2022 ("AD 3") is an appeal brought by the appellant, Mr Loy Wei Ezekiel ("Mr Loy"), against the decision of the Judge of the General Division of the High Court (the "Judge") in HC/RA 154/2021 ("RA 154") upholding the decision of the assistant registrar ("AR") *not* to set aside a judgment in default of appearance obtained against Mr Loy by the respondent, Yip Holdings Pte Ltd ("Yip Holdings"), in HC/S 836/2020 ("Suit 836"). For the purpose of AD 3, Mr Loy also applied for leave to adduce further evidence by way of AD/SUM 26/2022 ("SUM 26"). We heard and dismissed the application and the appeal on 11 August 2022. These are the reasons for our decision.

The facts

Background

2 To begin with, we highlight that HC/S 703/2017 ("Suit 703") is a related action, and it forms the backdrop to this appeal. The trial of that action was heard by Chan Seng Onn J (as he then was), with judgment delivered on 28 April 2020 in *Yip Fook Chong (alias Yip Ronald) and another v Loy Wei Ezekiel and another* [2020] SGHC 84 ("*Yip v Loy*"). For convenience, we draw on some of the undisputed facts as set out in *Yip v Loy*.

3 Yip Holdings is a company incorporated in Singapore. Its present directors and shareholders are Mr Loy and Mr Yip Fook Chong @ Yip Ronald ("Mr Yip").[1] Mr Loy is the majority shareholder with 105,000 shares (being 52.5% of the shares), while Mr Yip holds 95,000 (being 47.5% of the shares).[2]

4 Mr Loy first met Mr Yip sometime in or around December 2015. At that time, Mr Yip was a 73-year-old retiree. He was the sole director and shareholder of Yip Holdings which was a dormant company. As for Mr Loy, he was a 22-year-old businessman.[3]

5 Mr Yip owned and lived on a property at 130 Lorong J Telok Kurau Singapore 425958 (the "Telok Kurau property"). Originally, the Telok Kurau property was mortgaged to Coutts & Co Ltd ("Coutts").[4] As Coutts was winding down its operations, it pressured Mr Yip to pay back the outstanding loan of

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1 Statement of Claim at para 1.

2 *Yip v Loy* at [6].

3 *Yip v Loy* at [4]-[5].

4 Statement of Claim at para 2.

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$2,625,000. This led Mr Yip to look for an alternative source of funds to pay off Coutts.[5]

6 On or around 20 April 2016, Mr Loy was appointed a director of Yip Holdings, and 52.5% of the shares in Yip Holdings were transferred to Mr Loy between 20 to 21 June 2016. The notification of his appointment as director and the notifications in relation to the share transfers were lodged with Accounting and Corporate Regulatory Authority ("ACRA") from 22 to 23 September 2016 (the "Notifications").[6] In Suit 703, Mr Yip challenged the validity of the Notifications and the underlying transactions.

7 Then, on 17 November 2016, Yip Holdings entered into a loan agreement with Ethoz Capital Ltd ("Ethoz") for the sum of $4m, secured by the Telok Kurau property (the "Ethoz Loan"). Of the loan amount of $4m, a sum of $281,500 was retained by Ethoz as interest for the first year of the loan, facility fee and commitment fee, while another sum of $2,450,000 was paid to Coutts to discharge the mortgage over the Telok Kurau property. As for the remaining sum of $1,268,500 (the "Balance Sum"), it was deposited into Yip Holdings' bank account.[7] It was not disputed that subsequently, the interest that had to be paid to Ethoz attributable to the Balance Sum amounted to $76,110 (the "Interest").[8]

8 On 18 November 2016, Mr Loy transferred the Balance Sum to the bank account of Yip & Loy Pte Ltd ("YLPL"). Mr Loy is the sole shareholder and

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5 *Yip v Loy* at [9]–[10].

6 *Yip v Loy* at [7].

7 Statement of Claim at para 3.

8 Statement of Claim at para 4.

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director of YLPL which was subsequently renamed Property Street Pte Ltd ("PSPL"). Thereafter, by way of three transactions on 18 November 2016, 22 November 2016, and 30 December 2016, the Balance Sum was transferred out from YLPL's bank account into Mr Loy's personal bank account.[9]

The prior action – HC/S 703/2017

9 On 2 August 2017, Mr Yip and Yip Holdings commenced Suit 703 against Mr Loy and PSPL. Mr Yip and Yip Holdings alleged, *inter alia*, that:[10]

(a) Mr Yip did not appoint Mr Loy as a director of Yip Holdings, and Mr Loy was not duly appointed as a director of Yip Holdings;

(b) Mr Yip did not transfer the shares to Mr Loy, and that Mr Loy was not a shareholder of Yip Holdings;

(c) Mr Loy wrongfully accessed the ACRA online filing system to lodge the Notifications;

(d) Mr Loy caused Yip Holdings to enter into the Ethoz Loan;

(e) The transfer of $1,268,500 to PSPL was wrongful;

(f) Mr Loy and/or PSPL had been unjustly enriched, and Mr Yip and/or Yip Holdings had the right to recover the sum from Mr Loy and/or PSPL in restitution.

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9 Statement of Claim at para 5.

10 Statement of Claim (Amendment No 1) (S 703) at paras 4 – 15, 20 – 32.

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(g) Further or alternatively, the transfer of $1,268,500 was in breach of trust and/or fiduciary duty by Mr Loy, and that the sum should be repaid to Mr Yip and/or Yip Holdings.

(h) Mr Loy and/or PSPL should pay the Interest to Mr Yip and/or Yip Holdings.

10 In their defence, Mr Loy and PSPL claimed that between April to September 2016, an alleged oral agreement was entered into between Mr Loy and Mr Yip. The alleged oral agreement comprised the following parts:[11]

(a) Mr Yip agreed to appoint Mr Loy as a director of Yip Holdings, to transfer 52.5% of the shares in Yip Holdings to Mr Loy, and for Mr Loy to run the operations and finances of Yip Holdings;

(b) Mr Yip agreed to enter into the Ethoz Loan;

(c) Mr Yip agreed to give a sum of $175,000 to Mr Loy for reducing the amount payable to Coutts from $2,625,000 to $2,450,000 (the "haircut sum");

(d) Out of the loan sum of $4m, Mr Yip agreed for $281,500 to be retained by Ethoz, and for $2.45m to be used to discharge the mortgage in favour of Coutts. Further, Mr Yip agreed to the use of the Balance Sum for investments to grow the capital of Yip Holdings. We shall refer to this as the "Investment Agreement". Once the capital had been grown sufficiently, Loy would transfer the funds back to Yip Holdings' account and the profits would then be used to provide funds for a

[11] Defence (Amendment No 1) (S 703) at paras 7 – 10. *Yip v Loy* at [106].

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redevelopment project along Rangoon Road (the "redevelopment project").

(e) Concurrently, Mr Yip would also sell the Telok Kurau property, to provide more funds for the redevelopment project.

11 In response, Mr Yip and Yip Holdings denied the existence of any oral agreement. In the alternative, should the court find that Mr Yip agreed to any aspect of the oral agreement, they pleaded that any such aspect would not be valid or enforceable, and that they should not be bound, *inter alia,* on the ground of unconscionability or because Mr Yip had special disabilities, as a result of "necrotizing fasciitis, and was hospitalised from 14 July to 4 August 2016 undergoing 3 surgeries and a period of prolonged ICU stay", that Mr Loy took advantage of.[12]

12 In *Yip v Loy,* Chan J made the following findings:

(a) Mr Yip agreed to appoint Mr Loy as a director, to transfer the shares, and allow Mr Loy to run the operations and finances of Yip Holdings (at [147]–[164]).

(b) Mr Yip agreed to the Ethoz Loan. In fact, it was not disputed by Mr Yip that he signed the loan documents knowingly, and that he agreed to the Ethoz Loan (at [165]).

(c) Mr Yip did not agree to give Mr Loy the haircut sum (at [166]–[171]).

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12 Reply (S 703) at para 5.

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(d) Mr Yip did not agree to the Investment Agreement. He also did not agree to sell the Telok Kurau property to fund the redevelopment project (at [172]–[188]).

(e) While there was evidence from Dr Mervyn Koh ("Dr Koh") from Tan Tock Seng Hospital that Mr Yip was suffering from some mental impairment before and after his hospitalisation, as well as post-ICU delirium on 14 September 2016, Mr Yip signed the relevant resolutions in relation to the appointment of Mr Loy as director and the share transfers "with full knowledge of the nature of those documents". In fact, these documents were signed around the same time as the documents for the Ethoz Loan (which Mr Loy did not challenge). Further, Mr Yip did not specifically plead *non est factum* to contend that he did not know and understand what he was signing at the relevant time (at [144]–[146]).

(f) Given the view taken of the medical evidence, there was insufficient basis to find that Mr Yip had been exploited by Mr Loy (at [190]–[196]).

(g) The transfer of the Balance Sum out of Yip Holdings' account was unauthorised and was for Mr Loy's personal use and benefit (at [198]).

(h) Given the finding that share transfers were valid, Mr Loy is a majority shareholder of Yip Holdings. As the minority shareholder of Yip Holdings, Mr Yip did not have *locus standi* to commence the action without the consent of Mr Loy. Mr Yip also failed to obtain leave to pursue a derivative action. Accordingly, the claim against Mr Loy for breach of fiduciary duty was dismissed (at [199]–[205]).

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(i) The loss of the Balance Sum was suffered by Yip Holdings and not by Mr Yip as he had no proprietary rights to it. The failure of Mr Yip to pursue derivative action to sue as a minority shareholder of Yip Holdings meant that Yip Holdings was no longer a party to Suit 703 and the claim in unjust enrichment was dismissed (at [218]–[220]).

13 Accordingly, Chan J dismissed the claims in Suit 703.

Application for leave to commence a derivative action – HC/OS 526/2020

14 Following the outcome in *Yip v Loy,* on 5 June 2020, Mr Yip filed HC/OS 526/2020 ("OS 526") for leave to commence an action against Mr Loy in the name and on behalf of Yip Holdings pursuant to s 216A of the Companies Act 1967 (2020 Rev Ed) ("Companies Act"). Mr Loy attended two pre-trial conferences on 25 June 2020 and 16 July 2020, but he was absent for the final pre-trial conference on 6 August 2020. When Pang Khang Chau J granted the application at the hearing on 28 August 2020, he was also absent.

The present action – HC/S 836/2020

15 On 3 September 2020, Yip Holdings commenced Suit 836, claiming, *inter alia,* breach by Mr Loy of his duty of care and/or his statutory duty and/or fiduciary duties owed to Yip Holdings as director in misappropriating the Balance Sum, and for recovery of the Balance Sum and the Interest being a total amount of $1,344,610.[13]

16 On 13 September 2020, Yip Holdings obtained leave for substituted service, and duly served a copy of the Statement of Claim and the Writ of

[13] Statement of Claim at para 7.

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Summons by posting them on the front door of Mr Loy's address on 16 September 2020. As Mr Loy did not enter an appearance, on 28 September 2020, Yip Holdings obtained a default judgment pursuant to O 13 of the Rules of Court (2014 Rev Ed) ("ROC") against Mr Loy for the payment of $1,344,610.00, interest at 5.33% per annum from the date of writ to date of judgment and costs of $3,499.50 (the "O 13 Judgment"). On 14 January 2021, Yip Holdings commenced garnishee proceedings. On 28 January 2021, Mr Loy applied to set aside the O 13 Judgment by way of HC/SUM 457/2021 ("SUM 457").

The setting aside application – HC/SUM 457/2021

17 In support of SUM 457, Mr Loy filed a brief affidavit dated 19 March 2021 (the "Setting Aside Affidavit"). To explain the four-month delay before the application, Mr Loy stated that he and his mother were embroiled in criminal proceedings in the State Courts on charges involving misappropriation of the Balance Sum (the "State Courts proceedings"). Having exhausted his funds in legal proceedings, he had "absolutely no funds" to pay for legal representation to set aside the O 13 Judgment.[14]

18 Mr Loy proceeded to state that he had a *prima facie* defence. He asserted that "[Mr Yip] and [he] had an agreement for [him] to manage the S$1,268,500 and to invest the money so as to increase the assets of the [Yip Holdings]".[15] Mr Loy said that he had "set out relevant matters relating to this agreement in paragraphs 69 and 89 of [his] AEIC in [Suit 703]." Mr Loy's affidavit of evidence-in-chief of 24 April 2019 in Suit 703 (the "AEIC") is then exhibited

[14] Affidavit of LWE dated 19 March 2021 at paras 4 to 9.

[15] Affidavit of LWE dated 19 March 2021 at para 18.

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to the Setting Aside Affidavit as "LWE-2".[16] On that basis, Mr Loy denied that he misappropriated the Balance Sum, or breached any duties to Yip Holdings.[17] We shall refer to this as the "Intended Defence".

19 At para 69(c) of the AEIC, Mr Loy stated that Mr Yip agreed that the Balance Sum would form the capital of Yip Holdings, and Mr Loy would manage Yip Holdings' finances and work towards increasing its capital through investments. At para 69(d) of the AEIC, Mr Loy stated that Mr Yip agreed that Mr Loy would invest:

(a) approximately $900,000 in a property located at Lucky Plaza (the "Lucky Plaza property");

(b) approximately $200,000 in shares; and

(c) approximately $100,000 in a mobile application called "Property Street".

20 Turning to para 89 of his AEIC, we note that it falls under the sub-heading "Haircut". There, Mr Loy stated that "[h]aving utilised the S$4m [of the Ethoz Loan] in the manner set out in the paragraphs above", there was insufficient money left to pay him the haircut sum of $175,000 but he did not press Mr Yip for payment of the difference. Paragraph 89 thus refers to the preceding paragraphs generally without specificity. However, it was clear to us that for the Intended Defence Mr Loy relied on an agreement to invest the Balance Sum on terms as per the Investment Agreement as set out at para [19] above.

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16 Affidavit of LWE dated 19 March 2021 at para 19.

17 Affidavit of LWE dated 19 March 2021 at para 21.

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21 In addition to raising the Intended Defence, based on Mr Yip's mental incapacity, Mr Loy questioned the validity of these proceedings. According to Mr Loy, sometime in early March 2021, Dr Jerome Goh ("Dr Goh"), a psychiatrist from the Institute of Mental Health, gave evidence in the State Courts proceedings that Mr Yip was unfit to testify in court because of significant cognitive deficits.[18] In fact, Dr Goh examined Mr Yip on 21 September 2020 and stated his findings in his medical report dated 18 October 2020. Therefore, Mr Loy concluded that there was "a serious issue to be tried as to the instructions received by [Yip Holdings' lawyers] in this case and the veracity of the matters pleaded in the Statement of Claim".[19]

22 On 27 May 2021, the AR dismissed SUM 457. In the AR's view, the Intended Defence was but a collateral attack on the decision in Suit 703, and to allow Mr Loy to relitigate the issue again would be an abuse of process.[20] As regards Mr Loy's arguments regarding Mr Yip's mental capacity, the AR held that Mr Yip's daughter, Ms Yip Li-Fen ("Ms Yip"), was validly appointed as Mr Yip's donee under a valid lasting power of attorney and that there was no triable issue in relation to the validity of the proceedings. Therefore, there were no triable issues in the case. By way of RA 154, Mr Loy appealed against the AR's decision.

The appeal to the Judge - HC/RA 154/2021

23 On 2 August 2021, the Judge dismissed RA 154. Agreeing with the AR, the Judge found that the Intended Defence relied on the very same evidence

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18 Appellant's Skeletal Submissions at paras 18 – 19.

19 Affidavit of LWE dated 19 March 2021 at paragraphs 11 to 16.

20 Decision in SUM 457 at paras 10 – 13.

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Mr Loy had given in Suit 703. The Judge was of the view that Chan J, having considered the evidence before him, as well as the credibility of the witnesses, had made specific findings of fact that there was no Investment Agreement between Mr Yip and Mr Loy, that Mr Loy had breached his fiduciary duty to Yip Holdings, and that the transfer of the Balance Sum was unauthorised. The Intended Defence did not give rise to any triable issues, and it was no more than a collateral attack on the findings by Chan J in Suit 703.

The appeal

Mr Loy's case

24 On 2 September 2021, Mr Loy filed AD 3. In the Appellant's Case dated 25 March 2022, Mr Loy raised three main arguments. First, Mr Loy argued that the Judge's decision that there is an abuse of process is "*misconceived* because in these proceedings, [Mr Yip] is *claiming* against [him] for breach of his duty of care and/or statutory duty and/or his fiduciary duties owed to [Yip Holdings] as a Director, and for the sum of $1,355,610 that he caused [Yip Holdings] to suffer by his breaches... [emphasis added]". These "issues" were not decided in Suit 703 "because *no derivative action* had been brought [emphasis added]". There is "no basis for the [Judge] to suggest that there is an abuse of process if [Mr Loy] is allowed to *defend the claim brought by [Yip Holdings]* [emphasis added]".[21]

25 Second, Mr Loy submitted that there was additional evidence to be considered in support of the Intended Defence. Such additional evidence fell within four categories: (a) "many more new witnesses" who would support Mr Loy's contentions that he was authorised by Mr Yip "to utilise the

[21] Appellant's Case at pp 2 – 3.

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$1,344,610 for investments to grow [Yip Holdings'] funds" for the redevelopment project;[22] (b) evidence "detailed in paragraphs 9 to 17 of his affidavit filed on 26 November 2021 for CA/SUM 76/2021 ("the 26 November 2021 affidavit" and "CA/SUM 76" respectively)";[23] (c) proceedings involving Mr Yip's brother in an unrelated lawsuit that allegedly entailed an allegation of mental incapacity (which cast doubt on Mr Yip's denial of the Investment Agreement based on post-ICU delirium);[24] and (d) a document which Mr Loy had "recently found" which Mr Yip had signed consenting to Mr Loy's use of the Balance Sum to grow Yip Holdings' funds (the "Written Agreement").[25] To sum up, Mr Loy contended that there was more than sufficient evidence to suggest that "it [was] not safe or appropriate" to rely on Chan J decision to conclude that Mr Loy had no *prima facie* defence to the claim in these proceedings.[26]

26 Third, Mr Loy relied on the fact that Mr Yip lacked mental capacity to testify in the State Court proceedings. According to Mr Loy, Mr Yip's cognitive deficits called into question the instructions received by Yip Holdings' lawyers for the proceedings.

Yip Holdings' case

27 In response, Yip Holdings contended that in arguing that the Judge's application of abuse of process is "misconceived" because the claims in the two sets of proceedings are different, Mr Loy appeared to have confused cause of

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22 Appellant's Case at p 3; Appellant's Skeletal Arguments at para 10.

23 Appellant's Case at p 5; Appellant's Skeletal Arguments at para 12.

24 Appellant's Case at pp 10-12.

25 Appellant's Case at p 4.

26 Appellant's Case at p 13.

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action estoppel with abuse of process. For abuse of process to apply, there is no requirement that the causes of action in the two sets of proceedings be the same.[27] On the present facts, abuse of process was available to Yip Holdings.

28 Further, Yip Holdings disputed the admissibility, relevance and/or the weight to be accorded to the four categories of additional evidence relied on by Mr Loy to support the Intended Defence. Yip Holdings contended that as the Intended Defence is but a repeat of Mr Loy's defence in Suit 703, it is not a triable defence, and there is an abuse of process.[28] Furthermore, Yip Holdings added that issue estoppel arose to prevent Mr Loy from raising the Investment Agreement.[29]

29 In relation to the challenge to the validity of the proceedings based on Mr Loy's lack of mental capacity, Yip Holdings submitted that the matters pleaded in the Statement of Claim were largely based on indisputable facts as stated in *Yip v Loy*, and no triable issue arose from this.[30]

Application for leave to adduce further evidence for the appeal: AD/SUM 26/2022

30 Before we deal with the appeal, we address SUM 26. On the day of the hearing for the appeal, Mr Loy's counsel made an application to adjourn the proceedings in order to file a formal application to admit the Written Agreement which we referred to at [25] above.

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27 Respondent's Case at paras 28, 29 and 59.

28 Respondent's Case at para 19.

29 Respondent's Case at paras 49 – 58.

30 Respondent's Case at paras 42 and 63.

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31 We pause to observe that in the Appellant's Case dated 25 March 2022, Mr Loy stated that "[the Written Agreement] will be the basis of an application …to introduce fresh evidence for the appeal". The "new evidence" would be critical as it would demonstrate that Chan J was wrong in coming to his conclusion in Suit 703 that the Investment Agreement did not exist.[31] However, from 25 March 2022 to the hearing on 20 July 2022, no application was filed. In fact, in the Appellant's Skeletal Submissions filed on 12 July 2022, no mention was made of the Written Agreement. Mr Loy's counsel acknowledged the delay was on the part of Mr Loy, explaining that the Written Agreement had been misplaced, and that Mr Loy's mother found the document again the night before the hearing. After hearing the parties, we allowed the adjournment, and Mr Loy duly filed the application on 27 July 2022.

32 According to Mr Loy, Mr Yip signed the Written Agreement on 12 November 2016. The document states:[32]

YIP HOLDINGS PTE LTD

(UEN: 199004904D)

130 Lorong J Telok Kurau

Singapore 425958

12th November 2016

It is hereby agreed for the balance of the Ethoz loan of $1,268,500 shall be utilised;

1. $300,000 to be set aside as costs of acquiring the Ethoz loan, costs with regards to the Coutts repayment settlement, initial redevelopment

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31 Appellant's Case at p 4.

32 Affidavit of Loy Wei Ezekiel (SUM 26) at para 7 and Exhibit "LWE-1".

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costs including miscellaneous costs.

2. $20,000 to be reimbursed to Ronald Yip Fook Chong.

3. The balance funds to be invested in investments managed by Loy Wei Ezekiel.

Ronald Yip Fook Chong

[signature]

[handwritten name: Ronald Yip Fook Chong]

33 In his affidavit filed in support of the application, Mr Loy explained that after the Ethoz Loan was disbursed sometime in October 2016, Mr Yip started making "bizarre suggestions" about how the Balance Sum should be used. To prevent any misunderstanding, Mr Loy thought it best to have a written agreement drawn up. Thus, he prepared two copies of the agreement for Mr Yip to sign.[33]

34 Sometime on 12 November 2016, Mr Loy gave Mr Yip a lift and asked Mr Yip to sign the two copies in the car. The first copy was signed "awkwardly and badly" as the car was in motion. This is the Written Agreement produced before us. A second copy was signed after the car had stopped ("the second signed copy"). Mr Loy then placed the second signed copy in the boot of his car and placed the Written Agreement in the back seat of his car to be discarded. The Written Agreement was subsequently placed in the flat that he shared with his parents and brother.[34]

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33 Affidavit of Loy Wei Ezekiel (SUM 26) at paras 9, 12 and 13.

34 Affidavit of Loy Wei Ezekiel (SUM 26) at paras 14 to 22.

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35 When Mr Loy was arrested on 16 August 2017, the police seized the second signed copy from the boot of his car along with a bundle of other documents (the contents of which are not relevant to the present case).Mr Loy repeatedly asked the police to return the documents to him, but they refused his requests. In Suit 703, Mr Loy did not mention the existence of any written agreement as he had been advised by his previous lawyers that he could not say this because he was not in possession of the second signed copy, and he believed that the Written Agreement had been disposed of. It was only in early 2022 that Mr Loy's mother discovered the Written Agreement while she was clearing out the flat. However, his mother then misplaced the Written Agreement again due to subsequent police raids. It was only on the eve of the appeal hearing that she managed to locate it again.[35]

36 In response, Ms Yip and Ms Puno Lynneth Jamolong ("Ms Puno"), the domestic helper who takes care of Mr Yip, sought to cast doubt on Mr Loy's version on how the Written Agreement came about. In their affidavits,[36] they alleged that sometime on 31 August 2021 at about 11.50am, an unidentified man went to Mr Yip's residence to deliver mooncakes. He insisted that Mr Yip personally sign for the mooncakes and write his name below his signature. As Mr Yip was unable to write his name, Ms Puno wrote the words "Ronald Yip" and the words "Fook Chong" were added by the unidentified man. Ms Puno was unable to see the top portion of the document which was covered by the unidentified man. However, Ms Puno alleged that the signature in the Written Agreement was that signed by Mr Yip on 31 August 2021, and the words "Ronald Yip" were written by her. Through messages sent to Ms Yip, Ms Puno

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35 Affidavit of Loy Wei Ezekiel (SUM 26) at paras 23 to 28.

36 Reply Affidavit of Yip Li-Fen (SUM 26) and Reply Affidavit of Puno Lynneth Jamolong (SUM 26).

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informed Ms Yip about what had happened. At about 3.00pm, the same man returned to Mr Yip's residence to deliver a single mooncake and asked Mr Yip to sign for it again. Ms Puno found the request rather odd and took a picture of Mr Yip signing the second mooncake delivery form. Yip Holdings submitted that the bottom half of the Written Agreement looked very similar to the delivery form shown in the photograph.[37]

The parties' arguments

37 Mr Loy's arguments were threefold. First, Mr Loy submitted that as the O 13 Judgment was obtained by default, the three requirements set out in *Ladd v Marshall* [1954] 1 WLR 1489 ("*Ladd v Marshall*") for adducing fresh evidence on appeal should *not* be applied.[38] As the Written Agreement was highly relevant and cannot be said to lack credibility, it should be admitted for the purposes of this appeal.[39]

38 Second, Mr Loy argued that the *Ladd v Marshall* requirements were met in the present case.[40] In any event, he argued that should the first criterion of prior non-availability not be met, the court should exercise its discretion to act in the interests of justice.[41] Third, he argued that the Written Agreement itself provided a *prima facie* defence to Yip Holdings' claim.

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37 Respondent's Submissions (SUM 26) at para 36.

38 Appellant's Written Submissions (SUM 26) at paras 16 – 17.

39 Appellant's Written Submissions (SUM 26) at para 18.

40 Appellant's Written Submissions (SUM 26) at para 20.

41 Appellant's Written Submissions (SUM 26) at para 21.

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39 Yip Holdings' position was that the application should be dismissed because Mr Loy had not satisfied all three limbs of *Ladd v Marshall*.[42] First, given that Mr Loy had been in possession of the document but believed that he had misplaced it, the requirement of prior non-availability was not met.[43] Second, in light of the contrasting accounts as to how the Written Agreement came to be signed, there were serious questions about its credibility.[44] Third, the Written Agreement was inconsistent with the Intended Defence. This meant that the Written Agreement was of little relevance.[45]

Our decision on SUM 26

40 The three cumulative requirements to adduce further evidence on appeal set out in *Ladd v Marshall* are as follows:

(a) First, the evidence could not have been obtained with reasonable diligence for use at the hearing below (the "prior non-availability requirement").

(b) Second, the evidence, if given, would probably have an important influence on the result of the case, though it need not be decisive (the "materiality requirement").

(c) Third, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible (the "credibility requirement").

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42 Respondent's Written Submissions in SUM 26 at paras 26 – 41.

43 Respondent's Written Submissions in SUM 26 at paras 26 – 27.

44 Respondent's Written Submissions in SUM 26 at paras 34 – 41.

45 Respondent's Written Submissions in SUM 26 at paras 19 – 25 and 33.

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41 Further, in *Anan Group (Singapore) Pte Ltd v VTB Bank (Public Stock Joint Stock Co)* [2019] 2 SLR 341 at [57]–[59], the Court of Appeal set out these propositions. If the appeal concerns a decision made in a trial or hearing bearing the characteristics of a trial, the requirements in *Ladd v Marshall* should apply in its full rigour. Otherwise, the court is guided by the requirements in *Ladd v Marshall* but may not apply them strictly. Even if it is determined that the requirements in *Ladd v Marshall* are to be applied strictly, the court should then determine if there are any other reasons for which the *Ladd v Marshall* requirements should be relaxed in the interests of justice.

42 As pointed out by Mr Loy, the appeal arose out of the decision not to set aside the O 13 Judgment (which did not involve the taking of evidence). While we did not agree with Mr Loy's position that the *Ladd v Marshall* conditions should *not* be applied, we accepted that they need not be stringently applied. In any event, for the reasons that follow, we found that the Written Agreement was inadmissible in this appeal as it did not meet *any* of the *Ladd v Marshall* requirements.

43 First, we were unpersuaded by Mr Loy's unsubstantiated account that for the purpose of Suit 703, he was unable to procure the return of the second signed copy from the police and that he believed that the Written Agreement had been disposed of. Mr Loy has not produced any evidence to show that he had contacted the police about obtaining the second signed copy or that the police had refused to return it to him upon his request. There is also no logical reason why Mr Loy's previous lawyers would have advised him not to mention the written agreement throughout the trial for Suit 703. Besides, Mr Loy's claim as to the alleged advice from his previous lawyers was only a bare allegation. Further, we found it unbelievable that Mr Loy's mother found the Written

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Agreement "earlier this year", but that thereafter, she could not locate it *until* the eve of the appeal hearing. Indeed, we reiterate that in the Appellant's Case dated 25 March 2022, it was clearly stated that Mr Loy had recently found the document. However, for a good four months thereafter, no steps were taken to apply to adduce the document. Even if the prior non-availability requirement was not applied strictly, the fact that Mr Loy had failed to produce the Written Agreement both at the trial of Suit 703 and at the two hearings below, should clearly be taken against him.

44 Second, the Written Agreement contains terms that are fundamentally different from those of the Investment Agreement in three broad areas:

(a) First, the Written Agreement provides that out of the Balance Sum, a sum of $300,000 is "to be set aside as costs of acquiring the Ethoz loan, costs with regards to the Coutts repayment settlement, initial redevelopment costs including miscellaneous costs." This deduction of $300,000 from the Balance Sum is absent from the Investment Agreement. If so deducted, there would be a balance of $968,500.

(b) Second, the Written Agreement provides for a further sum of $20,000 to be reimbursed to Mr Yip out of the Balance Sum. Again, this is absent from the Investment Agreement. If so deducted from $968,500, there would be a balance of $948,500.

(c) Third, and most significantly, by the Investment Agreement, the Balance Sum was to be used as follows: (i) approximately $900,000 to be invested in the Lucky Plaza Property; (ii) approximately $200,000 to be invested in shares; and (iii) approximately $100,000 to be invested in the development of a mobile application. In contrast, the Written Agreement does not mention any of these three specific investments.

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> Rather, it refers generally to ploughing the "balance funds", *ie,* $948,500 (instead of the Balance Sum, *ie,* $1,268,500) into "investments managed by [Mr Loy]". Not a single investment is identified.

45 The stark differences between the Written Agreement and the Investment Agreement meant that the former was of no relevance to the determination of the key issue in the appeal, which was whether the Intended Defence based on the Investment Agreement formed a *prima facie* defence. The Written Agreement did not support the Investment Agreement. In fact, it was inconsistent with the latter. The introduction of the Written Agreement would mark a shift in Mr Loy's case. As articulated in *UJN v UJO* [2021] SGCA 18 ("*UJN*") at [7], the court should be disinclined to allow a party to adduce fresh evidence on appeal if that evidence is in aid of a position which is inconsistent with the position below. This also weighed against allowing Mr Loy's application.

46 Third, even setting aside the suspicion raised by the accounts of Ms Yip and Ms Puno that Mr Yip's signature on the Written Agreement was surreptitiously procured under the pretext of obtaining his acknowledgement for the delivery of mooncakes, we had genuine concerns about the credibility of the document. In and of itself, the emergence of such an important document almost six years after it was signed was unbelievable. What perturbed us more was Mr Loy's convoluted explanation of how two copies were signed to explain the extremely poor quality of Mr Yip's signature on the Written Agreement. In our judgment, the purported provenance cast serious doubt on the reliability of the document.

47 Finally, in terms of the contents of the Written Agreement, Mr Loy claimed that Mr Yip signed it on 12 November 2016, after the Ethoz Loan was

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disbursed. However, as Yip Holdings had pointed out, the Ethoz Loan was actually disbursed on 17 November 2016.[46] Relatedly, on 12 November 2016, the Balance Sum would not have been known. Therefore, it was odd that the Written Agreement sought to deal with the Balance Sum. Again, these aspects caused us to question the credibility of the Written Agreement.

48 For the foregoing reasons, we dismissed SUM 26.

Our decision in respect of the appeal

The applicable legal principles

49 Returning to the substantive appeal, we touch briefly on the applicable legal principles. Judgments granted under O 13 of the ROC fall broadly into those entered regularly, and those entered irregularly: see *Mercurine Pte Ltd v Canberra Development Pte Ltd* [2008] 4 SLR(R) 907 ("*Mercurine*") at [43]. The court's discretionary power to set aside a default judgment is found in O 13 r 8 of the ROC. To set aside a regular judgment, such as the one in the present case, a defendant must be able to establish a *prima facie* defence, in the sense of showing that there are triable or arguable issues: *Mercurine* at [60]. The assessment of whether there is a *prima facie* defence is not an exercise of discretion, but an evaluative assessment of the merits of the defence based on the evidence, albeit on a preliminary basis. If a *prima facie* defence exists, there then arises a question of discretion. In exercising the discretion, the court will balance the existence of the *prima facie* defence against other factors such as the period of and reason for any delay in applying to set aside including the prejudice that the plaintiff would suffer if the judgment were to be set aside: see

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[46] Respondent's Written Submissions (SUM 26) at para 41.

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U Myo Nyunt (alias Michael Nyunt) v First Property Holdings Pte Ltd [2021] 2 SLR 816 at [64] ("*U Myo Nyunt*").

The issues

50 Based on the parties' respective cases set out at [24]–[29] above, these were the issues raised for our determination:

(a) Whether the Intended Defence raised triable issues;

(b) Whether in relation to the Intended Defence, the extended doctrine of *res judicata* (or abuse of process) is applicable. Connected but distinct from this is the question whether issue estoppel arose to bar Mr Yip from raising the Intended Defence; and

(c) Whether Mr Yip's lack of mental capacity formed a triable issue.

51 For completeness, we note that the parties did not submit on the question of the exercise of the court's discretion. In particular, Yip Holdings did not take issue with the delay of four months by Mr Loy before bringing SUM 457 (see [17] above) or state that any prejudice had been caused to it.

Whether the Intended Defence raised triable issues

52 We begin then with the Intended Defence. The test in deciding whether a defendant can establish a *prima facie* defence is akin to the test for obtaining leave to defend in a summary judgment application under O 14 of the ROC (*Mercurine* at [60]; *U Myo Nyunt* at [64]). This means that a defendant must satisfy the court that he has a fair or reasonable probability of showing a real or *bona fide* defence, *ie,* that his evidence is reasonably capable of belief: see *Banque de Paris et des Pays-Bas (Suisse) SA v Costa de Naray and Christopher*

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John Walters [1984] 1 Lloyd's Rep 21 at 23; *Goh Chok Tong v Chee Soon Juan* [2003] 3 SLR(R) 32 at [25]; and *Lee Kuan Yew v Chee Soon Juan* [2003] 3 SLR(R) 8 at [24] and [25].

53 It is trite that leave to defend would not be granted on the basis of a mere assertion, even if it were contained in a sworn affidavit (*M2B World Asia Pacific Pte Ltd v Matsumura Akihiko* [2015] 1 SLR 325 at [19]), and there must be some evidence, direct or indirect, to support the assertions made (*Calvin Klein, Inc and another v HS International Pte Ltd and others* [2016] 5 SLR 1183 at [45]). In fact, the defendant's position must be articulated with "sufficient particularity and supported by cogent evidence" (*B2C2 Ltd v Quoine Pte Ltd* [2018] 4 SLR 1 at [50]). The court is to "independently assess, having regard to the evidence as a whole, if the defence is credible" (*JP Choon Pte Ltd v Lal Offshore Marine Pte Ltd* [2016] SGHC 115 at [15]). These amplifications of the test are particularly significant in the court's consideration of the question whether Mr Loy had demonstrated that his Intended Defence is real or *bona fide.*

The Setting Aside Affidavit

54 In the Setting Aside Affidavit, Mr Loy asserted there was an agreement by Mr Yip for him to manage and invest the Balance Sum, and then adopted in its entirety the matters set out in paras 69 and 89 of the AEIC (see [18] above). Therefore, the Intended Defence rested on the Investment Agreement raised in Suit 703.

55 In this connection, it is pertinent to observe that while there are 19 exhibits to the AEIC, para 69 of the AEIC itself makes no reference to any of the exhibits. Turning to paras 77 to 88 of the AEIC, there is only one exhibit adduced in support of the alleged investment in the Lucky Plaza property. This

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is an e-mail from Mr Yip to Mr Loy dated 17 November 2016, with Mr Yip asking Mr Loy to lend Mr Yip a sum of $5,000 so that Mr Yip can "go to Lucky Plaza to remit this S$5,000 to Mariko". At para 78 of the AEIC, Mr Loy explained that the e-mail showed that Mr Yip frequently visited the Lucky Plaza development to remit sums to his "mistress". As Mr Yip was familiar with the development, Mr Yip then wanted to invest in the Lucky Plaza property. Having perused the e-mail, and considered Mr Loy's explanation, in our view, this piece of evidence is completely tangential to the claim of an agreement to invest in the Lucky Plaza property. As for the other 18 exhibits, Mr Loy did not identify any of them (nor did we consider any of them) to be pertinent to the Intended Defence.

56 In the absence of any supporting evidence, much less cogent evidence, Mr Loy was doing no more than to point to his own bare assertions as to the existence of an oral agreement with Mr Yip to invest the Balance Sum (which was a substantial amount of $1,268,500) in certain investments, *ie,* as per the Investment Agreement. We did not have to take the contents of the Setting Aside Affidavit and the AEIC at face value. The mere assertions in Mr Loy's affidavits did not suffice to give rise to triable issues.

57 Significantly, from *Yip v Loy,* we note that there appeared to be some other documentary evidence produced in support of the Investment Agreement at the trial of Suit 703. In particular, there were records adduced in relation to the three forms of investments mentioned in the Investment Agreement. Having evaluated such evidence, Chan J observed as follows:

> (a) That the manner in which the funds were allegedly moved out of Yip Holdings' bank account for the payment for the Lucky Plaza property (including the use of Mr Loy's mother's two bank accounts)

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was suspicious. This indicated that there was no agreement for the use of the Balance Sum to purchase the Lucky Plaza property (*Yip v Loy* at [79] and [112]).

(b) That Mr Loy's Central Depository ("CDP") account statements contradicted his evidence at trial as to how the $200,000 was used for various share investments as agreed with Mr Yip (*Yip v Loy* at [132]–[133] and [181]).

(c) That the invoices for the alleged mobile application only amounted to $28,500 and not the $100,000 Mr Loy claimed he had invested in "Property Street" (*Yip v Loy* at [181]).

58 For the purposes of the appeal, it is unnecessary for us to express any view on the correctness of Chan J's assessment of such evidence, or the soundness of his finding that the Investment Agreement did not exist (based, *inter alia,* on the observations above). The point we wish to make is this. Mr Loy had to convince us based on cogent evidence that he had a *prima facie* defence based on the Investment Agreement. This he woefully failed to do. As discussed at [57] above, there appeared to be some documentary evidence, including bank records, CDP account statements and invoices, concerning the purported transactions. But Mr Loy did not think it fit to present a comprehensive affidavit in support of his case, properly exhibiting *all* necessary evidence for consideration by the court. At the risk of repeating ourselves, in the Setting Aside Affidavit, Mr Loy chose to cursorily cross-refer to two paragraphs in the AEIC (with one e-mail exhibit of little relevance) to support the Intended Defence.

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59 This left us to seriously ponder whether Mr Loy acknowledged that in any event, the records would not have supported the Intended Defence. Further, we observe that such records do not even form part of his bid to introduce four categories of further evidence by way of the Appellant's Case (see [60] below onwards). This reinforced our concern. In such circumstances, based on the Setting Aside Affidavit, Mr Loy was unable to persuade us that he had a *prima facie* defence.

The further evidence

60 It seemed to us that having lost the appeal before the Judge, Mr Loy then recognised the evidential hurdle he faced. In the Appellant's Case, Mr Loy contended that there was additional evidence falling within four categories in support of the Intended Defence (see [25] above). Given that the Written Agreement was the subject matter of SUM 26, we shall deal with it separately from the first three categories. For the reasons which follow, we found that this approach did not assist Mr Loy in shoring up the Intended Defence.

(1) Purported new witnesses

61 Apart from the statement in the Appellant's Case that there were new witnesses he could rely on in support of the oral agreement with Mr Yip, Mr Loy did not provide any details as to who these witnesses were or what evidence they might proffer. Such an assertion was vague and unsubstantiated. More fundamentally, in the Setting Aside Affidavit, Mr Loy did not mention that he had new witnesses. Mr Loy did not seek leave to file any further evidence on this point, nor did he seek leave for any affidavit to be filed by any of the purported witnesses under O 56A r 17 of the ROC. As Yip Holdings pointed out, this was tantamount to evidence being given from the bar. Accordingly, we were unable to accord any weight to this submission.

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(2) Evidence in the 26 November 2021 affidavit

62 Mr Loy also relied on the contents of paras 9 to 17 of the 26 November 2021 affidavit, concerning matters which had emerged in the State Courts proceedings. Some of the points raised by Mr Loy are as follows:[47]

(a) Mr Yip had admitted to the police on 21 August 2017 that he had engaged a debt collector called "Benny" to collect money from Mr Loy.[48]

(b) The Ethoz Loan was meant for PSPL.[49]

(c) Yip Holdings' counsel had been able to gain access to the files belonging to the Prosecution and investigating officers involved in the State Courts proceedings.[50]

(d) There were inconsistencies between the accounts of Ms Yip and Dr Koh in Suit 703 as to the reason for Mr Yip's hospitalisation. While Ms Yip claimed that the reason for her father's admission was for necrotising fasciitis, Mr Yip was actually hospitalised for a motorbike accident.[51]

63 We noted that Yip Holdings objected to Mr Loy's reference to this affidavit, and its inclusion in the record of appeal. The affidavit was filed in CA/SUM 76 which was an application by Yip Holdings to strike out CA/CA

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47 ROA Vol 3B at pp 220 - 221.

48 ROA Vol 3B at p 221, Reply Affidavit dated 26 November 2021 at para 11.

49 ROA Vol 3B at pp 221 – 222, Reply Affidavit dated 26 November 2021 at para 12.

50 ROA Vol 3B at p 223, Reply Affidavit dated 26 November 2021 at paras 16 – 17.

51 Reply Affidavit dated 26 November 2021 at p 5.

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51/2021 ("CA 51"), the initial appeal against the Judge's decision, for having been wrongly filed to the Court of Appeal. While CA 51 has since been transferred to this court, the affidavit was not properly placed before this court for the appeal. We agreed with Yip Holdings that Mr Loy should have applied for leave under O 56A r 17 of the ROC to adduce further evidence for the purpose of this appeal.

64 Be that as it may, having considered the contents of the affidavit, we were of the view that nothing contained in it strengthened the credibility of Intended Defence.

65 First, as regards the issue concerning "Benny", in Suit 703, Mr Loy had explained that after the Balance Sum was transferred out of Yip Holdings, he ceased contact with Mr Yip as he had been afraid of "Benny" who was allegedly a debt collector. Chan J rejected the explanation, and found Mr Loy's "disappearance" to be suspicious. However, even if it were to be accepted that Mr Yip had engaged "Benny" to collect the money from Mr Loy, this entire area was quite peripheral to the question of the existence of the Investment Agreement.

66 Second, in relation to Mr Loy's claim that the Ethoz Loan was meant for PSPL rather than Yip Holdings, this was simply not supported by the loan facility document which states that Yip Holdings was the borrower.

67 Third, as regards the allegations made by Mr Loy against Yip Holdings' counsel, even if proven true, we failed to see their relevance. These allegations also related to events that had occurred in August 2019, before the commencement of the trial of Suit 703, but Mr Loy did not even deem it necessary to raise or canvass them there.

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68 Fourth, as regards the alleged inconsistencies relating to why Mr Yip was hospitalised, Mr Loy's claim is contradicted by the medical report of Mr Yip by Tan Tock Seng Hospital which he had appended in his affidavit, stating that Mr Yip was hospitalised for "[l]eft forearm necrotising fasciitis with septic shock".[52] Besides, any inconsistencies concerning the reason for Mr Yip's hospitalisation did not change the fact that Mr Yip subsequently developed issues with his mental faculties as a result of his hospitalisation. Therefore, it was not clear how any inconsistencies would give rise to any triable issues in relation to the Investment Agreement.

(3) Proceedings involving Mr Yip's brother

69 Mr Loy had also referred to the proceedings in HC/S 1148/2017 ("Suit 1148") where Mr Yip's brother who was sued based on a personal guarantee on a loan had raised a defence of unsoundness of mind.[53] Mr Loy argued that there was a parallel with Mr Yip's claim in Suit 703 that Mr Yip was mentally impaired when he dealt with Mr Loy. This indicated that Mr Yip was likely the "mastermind" who had come up with the broadly similar arguments premised on an unsoundness of mind, and that there was a "familiar ring to the Yip family's *modus operandi* in deceiving their fellow partners and invoking the defence of mental incapacity.[54] Putting aside the question whether the evidence was properly introduced for the appeal, the relevance of the conduct of Mr Yip's brother in Suit 1148 was highly questionable. Given that there was medical evidence concerning Mr Yip's poor mental state at the material time, it was completely far-fetched to allege that *any* invocation of

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52 Reply Affidavit dated 26 November 2021 at p 22.

53 Appellant's Case at p 10.

54 Appellant's Case at p 11; Appellant's Written Submissions at para 24.

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mental incapacity was a scam. The effect of any such mental incapacity, of course, was a separate matter. We did not think that these allegations assisted Mr Loy at all.

(4) Conclusion

70 To sum up, albeit belatedly, Mr Loy had sought to formally apply to adduce the Written Agreement by way of SUM 26. In our view, the fact that he did not do so in respect of any of the other categories, especially the evidence from the purported new witnesses, reflected his lack of conviction that such evidence is material. Indeed, the further evidence put forth was either vague and unsubstantiated (*ie, new witnesses*), or pertained to peripheral or irrelevant matters (*ie,* the evidence in the 26 November 2021 affidavit, and proceedings involving Mr Yip's brother). Nothing struck us to be of substance. In our judgment, even if we were to allow Mr Loy to rely on such evidence (which had not been properly put before us), there was nothing to make the Intended Defence more credible. This brings us then to the Written Agreement.

The Written Agreement

71 The entire saga surrounding the Written Agreement not only detracted from the credibility of the Intended Defence, but also seriously undermined Mr Loy's credibility as a witness. As analysed at [44] above, in material aspects, the terms of the Written Agreement were inconsistent with the Investment Agreement. Significantly, the Written Agreement did not provide for any specific investment to be made. If the Written Agreement had been admitted into evidence, rather than strengthening Mr Loy's Intended Defence, it would have weakened his case based on the Investment Agreement (see [58] above). Furthermore, to our minds, Mr Loy's entire affidavit in support of SUM 26 beggared belief. In particular, we were highly sceptical of a series of incredible

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claims made by Mr Loy in it. These included the explanation of how the Written Agreement was signed in the car by Mr Yip accounting for the poor quality of the signature, that Mr Loy was advised by his previous lawyers not to mention the Written Agreement at all at the trial of Suit 703, that the Written Agreement was found around the time of the filing of the Appellant's Case but then it was misplaced, and that it miraculously emerged again at the doorstep of the hearing of the appeal (see [46] and [47] above). Thus, we were fortified in our conclusion that Mr Loy was unable to demonstrate that there was a *prima facie* defence based on the Investment Agreement.

Conclusion

72 To round off, the fact of the matter is that Mr Loy had failed to present a credible defence. He failed to offer any credible evidence in support of the Intended Defence. He had not shown that the Intended Defence disclosed any triable issues to constitute a *prima facie* defence.

Whether extended doctrine of res judicata is applicable, or whether issue estoppel arose against Mr Loy

73 We move on to Mr Loy's argument that the Judge's application of abuse of process was "misconceived" (see [24] above), which then gave rise to a cluster of issues relating to *res judicata* (see *Goh Nellie v Goh Lian Teck and others* [2007] 1 SLR 453; *The Royal Bank of Scotland NV (formerly known as ABN Amro Bank NV) v TT International Ltd (nTan Corporate Advisory Pte Ltd and others, other parties) and another appeal* [2015] 5 SLR 1104).

74 In this connection, we acknowledge Yip Holdings' submission that the existence of the Investment Agreement was an issue that was canvassed in Suit 703. Having reviewed the evidence, and having considered the credibility

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of the witnesses including Mr Yip, Mr Loy and Ms Yip, Chan J found that the Investment Agreement did not exist. That said, it is equally important to note that in dismissing the claims for the Balance Sum and Interest, Chan J held that Mr Yip did not have *locus standi* to bring the claims (see [12(h)] and [12(i)] above).

75 Based on these findings, the parties argued whether Mr Loy should be *precluded* from raising the Intended Defence by the extended doctrine of *res judicata* (or abuse of process). Further, Yip Holdings submitted that Mr Loy seemed to be labouring under the misapprehension that it was relying on cause of action estoppel, but it clarified that it was not. However, in addition to abuse of process, Yip Holdings argued that issue estoppel also applied in its favour. Mr Loy did not respond to the two latter points.

76 Be that as it may, in arriving at our conclusion that the Intended Defence is not a *prima facie* defence for Suit 836, we did not need to rely on Chan J's finding that the Investment Agreement did not exist. In our analysis, we focused entirely on the fundamental question whether the evidence put before us by Mr Loy was reasonably capable of belief. In this regard, our reasoning differed from that of the AR and the Judge. In light of our approach, there is no need for us to engage the *res judicata* issues.

Whether Mr Yip's lack of mental capacity raised a triable issue

77 We proceed to address Mr Loy's submission that Mr Yip currently lacked mental capacity, therefore bringing into question whether the matters pleaded in the Statement of Claim were accurate, or if Yip Holdings' lawyers had received proper instructions.

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78 In our judgment, whether Mr Yip lacked mental capacity did not raise any triable issue as regards to this case. First, Mr Loy did not contest Mr Yip's lack of mental capacity when Mr Yip applied for leave to commence derivative action in OS 526. As set out at [14] above, Mr Loy was fully aware of the proceedings. He attended two pre-trial conferences. He had the opportunity to raise his objection then, as Mr Yip's mental condition was already in issue at the trial of Suit 703. He did not do so. Moreover, he did not attend the hearing of OS 526 itself. The order was properly obtained by Mr Yip. Since then, it has not been set aside by Mr Loy.

79 Second, it was not disputed by Mr Loy that Ms Yip, who has taken over Mr Yip's affairs, was properly appointed as Mr Yip's donee by way of a valid lasting power of attorney. Ms Yip has filed an affidavit explaining that she has the authority to act on Mr Yip's behalf to give instructions to Yip Holdings' lawyers in relation to these proceedings. Mr Loy did not challenge the validity of the lasting power of attorney.

80 Third, and in any event, the matters pleaded in Suit 836 are substantially the same as those pleaded in Suit 703. Most of the background facts are uncontroversial and are set out in *Yip v Loy.* Hence, it did not matter that Mr Yip now no longer has the capacity to speak on these matters from his personal knowledge, as Yip Holdings has essentially relied on the facts put forward in Suit 703.

81 Accordingly, we were of the view that the fact that Mr Yip now lacked mental capacity did not raise a triable issue.

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Conclusion

82 For the reasons given above, we dismissed SUM 26 and AD 3. Having considered the parties' costs submissions, we ordered Mr Loy to pay costs of $24,000 (all in) to Yip Holdings. The usual consequential orders were to apply.

Belinda Ang Saw Ean
Justice of the Court of Appeal

Woo Bih Li
Judge of the Appellate Division

Hoo Sheau Peng
Judge of the High Court

Lim Tean (Carson Law Chambers) for the appellant;
Yeoh Oon Weng Vincent (Malkin & Maxwell LLP) for the respondent.

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